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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE CARGILL, INCORPORATED,
Petitioner,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

PETER J. DETROY
NORMAN, HANSON & DETROY
415 Congress Street
Portland, Maine 04112
(207) 774-7000

BERNHARDT K. WRUBLE*
WILLIAM R. SHERMAN
VERNER, LIIPFERT, BERNHARD, MCPHERSON & HAND CHTD.
901 - 15th Street, N.W.
Washington, D.C. 20005
(202) 371-6097

Counsel for Petitioner
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. 1-800-347-8208

HOPP

QUESTIONS PRESENTED

While the district court judge was considering petitioner's motion to dismiss plaintiffs' antitrust complaint, he became involved in a personal real estate dispute and retained plaintiffs' law firm, thus entering into a relationship that apparently required his disqualification *sua sponte* under 28 U.S.C. § 455(a). The judge did not disclose the relationship during its course. When, however, the dispute was resolved to his "satisfaction" and he had paid his legal bill, he called a conference, for local counsel only, where he solicited and obtained local counsel's "waiver" in apparent violation of 28 U.S.C. § 455(e) and Canon 3(D) of the Code of Judicial Ethics ("the Code"). Four business days later, the judge issued a lengthy decision on the pending motion, at odds with applicable authority and in plaintiffs' favor. On petitioner's objection, he refused to recuse himself or to withdraw the decision. A divided panel of the court of appeals denied a petition for writ of mandamus. The court *en banc*, dividing 3-3, denied the petition for rehearing.

The questions presented are:

1. Whether, under 28 U.S.C. § 455(a) and the Code, a judge is required to disqualify himself promptly when he retains a law firm that is involved in a case before him to represent him in a personal dispute.

2. Whether any legal effect may be given to an alleged waiver of disqualification that is obtained in violation of 28 U.S.C. § 455(e) and Canon 3(D) of the Code.

3. Whether the court of appeals abdicated its responsibility to act under 28 U.S.C. § 1651(a) and acted in conflict with *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988) when it refused to resolve the issue of the judge's apparent disqualification promptly and instead remitted the matter to an end-of-case appeal -- thus sanctioning a continuing appearance of impropriety, and relying on an invalid waiver and the "failure" of the petitioner to meet a supposed requirement, rejected by Congress, of "immediacy" in making any objection.

PARTIES TO THE PROCEEDING

In the underlying action, plaintiffs are Frederick Ashmore, David Boya, William Simone, and Richard Simeone; and the defendant, petitioner here, is Cargill, Incorporated, which has no publicly-held subsidiaries and no parent corporation. The district judge, by choice, was not a party to the mandamus proceeding.

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IN THE

Supreme Court of the United States

October Term, 1995

No.

In re Cargill, Incorporated,

Petitioner

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Cargill, Incorporated ("Cargill" or "petitioner"), respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at *In re Cargill, Inc.*, 66 F.3d 1256 (1st Cir. 1995) and reprinted at App. 14a-54a. The memorandum decision of the court *en banc* is reprinted at App. 12a-13a. The opinion of the United States District Court for the District of Maine, unpublished, is reprinted at App. 55a-73a. Opinions of the district court on related matters

are published as *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 843 F. Supp. 759 (D. Me. 1994) and *Ashmore v. Northeast Petroleum Div. of Cargill, Inc.*, 855 F. Supp. 438 (D. Me. 1994).

JURISDICTION

The judgment of the court of appeals was entered on October 10, 1995. The petition for rehearing was denied on November 16, 1995. (App. 12a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND CANON INVOLVED

The statutory provisions involved in this case, 28 U.S.C. § 455 and 28 U.S.C. § 1651, are set forth in the appendix at App. 1a and 5a, respectively. Sections of Canon 3 of the Code of Judicial Ethics, as approved by the Judicial Conference, are set forth at App. 5a.

STATEMENT

Petitioner moved, early in the proceedings, to disqualify the district judge, and to vacate an opinion rendered by him, based on his appearance of partiality and a related violation of 28 U.S.C. § 455. The district court denied the motion. A divided panel of the First Circuit denied petitioner's application for a writ of mandamus. The court *en banc* then divided 3-3 on the petition for rehearing, which consequently was denied.

FACTS

The essential elements giving rise to this matter are uncomplicated. Four former salesmen of a corporate division of petitioner alleged that they were discharged because they objected to violations of the Robinson-Patman Act, 15 U.S.C. § 13,[1/] and sought treble damages based on lost employment compensation. Petitioner moved to dismiss on grounds, *inter alia*, that such employees had suffered no "antitrust injury" and had no "antitrust standing," a position supported by overwhelming authority.[2/]

While the district judge was presiding over the case and actively considering the motion to dismiss, he hired Gerald Petruccelli, a "name" partner of plaintiffs' law firm, Petruccelli & Martin, located in Portland, Maine, where the court sat, to represent him and his wife in a personal real estate dispute. That relationship, authority holds,[3/] required the judge's

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1/ In proceedings elsewhere, these same plaintiffs claim that they were discharged because of age, ethnic discrimination, and other reasons.

2/ *See*, *infra*, n.5.

3/ The Committee on Codes of Conduct of the United States Judicial Conference has indicated that such a relationship requires recusal, absent waiver. *Guide to Judiciary Policies and Procedures*, Vol. II, Codes of Conduct for Judges and Judicial Employees, Nov. 1993, at V-25; *see Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980); *Texaco, Inc. v. Chandler*, 354 F.2d 655, 657 (10th Cir. 1965), *cert. denied*, 383 U.S. 396 (1966); *Rapp v. Van Dusen*, 350 F.2d 806, 814 (3d Cir. 1965) (*en banc*); *Quinones v. Nettleship*, Civil No. 82-3063 (D.P.R. Sept. 21,

(continued...)

disqualification under 28 U.S.C. § 455(a).

During the approximately three-week representation, the judge made no disclosure of the Petruccelli relationship, but worked on the pending motion.[4/] After Mr. Petruccelli resolved the dispute to the judge's "satisfaction" (App. 34a.), the judge paid his legal bill on January 10, 1994, and on the next day scheduled a conference, upon 24 hours' notice, for Wednesday, January 12, 1994, notifying only local Maine counsel. Petitioner's Maine counsel was not told, and, despite effort, could not find out, the reason for the conference. (App. 102a.)

At the conference, the district judge disclosed, but minimized, the Petruccelli relationship. (While formally addressing this matter on three occasions, the judge has not disclosed the substance of the matter.

3/(...continued)
1983), *order reprinted at* 595 F. Supp. 589; *Smith v. Sikorski Aircraft*, 420 F. Supp. 661, 662 (C.D. Cal. 1976). Other courts have viewed such a relationship as disqualifying, but have relied upon factors notably absent here, (1) the passage of substantial time, or (2) the withdrawal of counsel, in declining to require recusal. *See In re Allied-Signal, Inc.*, 891 F.2d 974, 976 (1st Cir. 1989); *In re Georgetown Park Apartments, Ltd.*, 143 B.R. 557, 560 (Bankr. 9th Cir. 1992); *In re Placid Oil Co.*, 802 F.2d 783, 786 (5th Cir. 1986); *Duke v. Pfizer, Inc.*, 668 F. Supp. 1031, 1036 (E.D. Mich. 1987).

4/ The statement in the court of appeal's opinion that the district judge first learned that the Petruccelli firm was involved in this case "at about the time that the attorney-client relationship ended" (App. 17a.), conflicts with the record, which indicates an earlier time. The judge stated that he learned about the conflict from the clerk of the court several days after the representation was first undertaken, but that he could not remember exactly when. (App. 75a.)

See, *infra*, n.9.) The judge affirmed that he was "morally certain" that he could preside; said only that disclosure of the relationship was "arguably" proper; and sought "to see if anyone had any objection." Plaintiffs' counsel, previously aware of the relationship, declared "[A]bsolutely no objection." The judge made an additional comment diminishing his relationship with the law firm. Petitioner's local counsel then said, "No objection." (App. 34a-35a.)

Having thus obtained counsel's "waiver," the judge announced that he intended to decide the pending motion to dismiss "within a week or so"; and then within four business days issued a lengthy opinion deciding the motion in favor of plaintiffs, in every respect -- contrary to prevailing authority, including that of the Court.[5/]

Plaintiffs' lawyers knew for weeks that their law firm was representing the judge, but they had said nothing, despite a litigant's responsibility to disclose

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5/ All six lower court cases addressing the issue under the Robinson-Patman Act had denied antitrust standing to sales representatives. Under the broader scope of the Sherman Act, such standing had been denied in ten appellate and district court decisions. The sole contrary authority was a split decision of the 9th Circuit, with now Justice Kennedy dissenting, (and one district court following it) that had been vacated and remanded by the Court; it was then reissued on remand with the same conclusion, over Justice Kennedy's second dissent, and the case was settled while review by this Court was again sought. *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982), *vacated and remanded*, 460 U.S. 1007 (1983), *on remand*, 740 F.2d 739 (9th Cir. 1984), *cert. dismissed at request of parties*, 469 U.S. 1200 (1985). The Court's later decision in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334-35 (1990) also precluded such standing. (Certain lesser matters were involved in petitioner's motion to dismiss.)

ethical issues promptly. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 868 (1988). They appeared at the January 12 hearing without raising the matter; and they initiated assent to the judge's presiding. (App. 34a-35a.)

The actions taken by the district judge to obtain counsel's "waiver" violated, in several respects, the letter, spirit and substance of 28 U.S.C. §§ 455(a) and (e) and Canon 3 of the Code of Judicial Ethics, as adopted by the Judicial Conference ("the Code"). These provisions require that a judge *sua sponte* declare himself or herself disqualified in any circumstance that might reasonably give rise to an appearance of partiality. As protection against judicial pressure, they also require that any "waiver" or "remittal of disqualification" must come from the parties, not the lawyers -- after full disclosure; and Canon 3 recites that any remittal must occur outside the presence of the judge. The majority opinion below, however, expressed little concern with the statutory and code violations. Rather it questioned the need to comply with either § 455(e) or Canon 3(D) and held that the district judge's obtaining an invalid waiver had the perverse effect of shifting responsibility to the petitioner itself -- requiring petitioner to communicate any ethical misgivings to the judge, not with mere timeliness, but with "immediacy" (App. 31a.), and to act before petitioner had determined whether it had a well-grounded objection in the circumstances. On this basis, the majority held that petitioner forfeited any relief by mandamus. (App. 23a-24a, 30a-31a.)

The majority opinion turned the intended rules of disqualification upside down, based on the following

facts. After the January 12 conference, petitioner's Maine counsel telephoned petitioner's lead counsel, who in turn immediately telephoned petitioner. The responsible individual there, away and unreachable, returned the call on the afternoon of Friday, January 14, 1994, just before a three-day federal holiday weekend. That individual spoke with an associate of the law firm, who, in lead counsel's absence, urged a conference at the beginning of the week. (App. 98a.) The contemplated conversation took place on the next business day, Tuesday. (App. 95a.) On the next day, Wednesday, January 19, 1994, the district judge issued his decision. The majority opinion thus obligated petitioner to take action within a narrow window comprising one and a half business days.

Petitioner confronted a situation where the district judge had affirmed his impartiality, and its own local counsel had already committed itself and was no longer available to assist on this matter (App. 81a.); further, petitioner faced questions arising in the unfamiliar and sensitive area of judicial qualification, complicated by the misbegotten "waiver" of its local counsel, as well as the obligation imposed by Rule 11 of the Federal Rule of Civil Procedure. Petitioner utilized the short period before the court conference set for February 14, 1994 to assess the matter. Promptly, prior to the conference, petitioner sent a letter to the clerk, for information of the district judge, setting forth its position. (App. 80a.)

As a result, the district judge called for a response by plaintiffs (App. 79a.); he then changed his mind and directed the parties to file a formal motion and cancelled the conference. (App. 77a.) He also

issued a Notice to Counsel providing additional views on his Petruccelli relationship. (App. 74a.) On May 12, 1994, he denied Cargill's motion on the ground that no reasonable person would question his impartiality. (App. 55a.)

The majority opinion of the court of appeals devoted little attention to the actions of the judge, although it virtually conceded that his relationship with Mr. Petruccelli was disqualifying. (App. 22a-23a; see App. 39a, 47a-52a, Campbell, J., dissenting.) The majority then framed the question -- so as to invite an erosion of the statutory requirements -- as whether petitioner's local counsel had "effected a fully valid waiver." (App. 23a.) The majority avoided determining that matter as well; Judge Campbell, dissenting, found the alleged waiver obviously invalid. (App. 39a, 41a.) The majority instead relied upon the invalid waiver and the supposed "silence" of petitioner, for what it called a "substantial" period (App. 24a.), to find an "uncertainty" as to petitioner's right to relief. (App. 24a.) The majority found no "unclean hands" but speculated that the "waiver" and elapsed time were "suggestive" of petitioner's "plot to await the results of the judge's impending decision." (App. 29a.)

The majority opinion thus denied the writ; allowed the district judge to continue to sit; left unclear the application of § 455 and the Canons (App. 24a-26a.); ignored the requirements of § 455(e), Canon 3(D), and the procedures adopted by the Judicial Conference to insulate disqualification matters from judicial pressure and retaliation (App. 30a-31a.); and left the entire issue to be decided at the end of the case, on appeal -- after an antitrust trial that is to be

held under the cloud of maintaining in place a district judge who, concededly, should not sit. (App. 24a, 30a.) The opinion says nothing adverse about the apparent violations of statute by the judge or about the withholding of information by plaintiffs' counsel, but sets forth extensive, derisive commentary and speculation concerning the petitioner, which, significantly, violated no rule whatever.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. *The majority opinion undermines the statute and the Court's prior holdings, and it is in conflict in several respects with decisions of other courts of appeals.*

The decision below presents important and disturbing questions about the construction and application of several sections of 28 U.S.C. § 455. Subsection (a) provides that a judge may not sit "in any proceeding in which his impartiality might reasonably be questioned." Subsection (e), in conformity with Canon 3(D) of the Code, authorizes waivers -- limited to disqualifications based on subsection (a) -- by "parties," as distinct from "lawyers"; and like Canon 3(D), it requires full prior disclosure. Here, the majority opinion tolerates and prolongs a virtually conceded appearance of impropriety; and it compounds that statutory violation both by repeatedly giving effect to an invalid "waiver" (see, *e.g.*, App. 26a, 29a, and 31a.) and by proposing to give the invalid "waiver" determinative weight after trial. (App. 24a.) Further, through its substance, tone and plainly inaccurate

statements about the factual record,[6/] the decision below raises intimidating barriers that undermine the very objectives of the statute. The decision also confuses the responsible exercise of a court's mandamus authority with the different matter, addressed by the Court in *Liljeberg*, 486 U.S. at 859-60, of tailoring a remedy.

The majority opinion is unique in denying a writ of mandamus without actually deciding the judicial disqualification issues that are ripe, remitting them instead to an end-of-case appeal. This course is not a proper exercise of discretion; rather, it is irreconcilable with the view expressed by the Court in *Liljeberg*, 486 U.S. at 868, and by other courts, that matters of judicial disqualification must be resolved promptly. The strained course proposed by the majority opinion will result in demonstrable harm to the administration of justice (see, *infra*, at 24-28), and its practical effect, as Judge Campbell's dissent points out, is to deny relief entirely. (App. 47a.)

The decision is in conflict with those of other circuits. It conflicts with the Seventh Circuit's holding that matters of judicial disqualification must be raised by petition for mandamus and cannot be saved for appeal. *United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986). It conflicts with the Third Circuit's rule -- supported squarely by the legislative history -- that because of the

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6/ *See, e.g., supra*, n.4 and *infra*, nn.9 & 12. Notably, the majority opinion also accepts, uncritically, all of the district judge's recitals regarding his personal motives and undisclosed intentions, rather than assessing the appearances arising from the facts.

overriding importance of maintaining public confidence in the courts, consideration should not be given to contentions that a party acted with improper motive in seeking disqualification, *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 164 (3d Cir. 1993). In this respect the conflict is extreme inasmuch as the majority opinion is willing to deny a remedy based solely on a highly tenuous suggestion it divined from the record. Further, in giving legal recognition to the alleged "waiver," the decision is in conflict with § 455(e), Canon 3(D), and the Fifth Circuit's position in *Hall v. Small Business Admin.*, 695 F.2d 175, 180 n.3 (5th Cir. 1983), that the process of waiver must involve the parties directly, take place out of the presence of the judge, and be accomplished anonymously.

2. *There is no statutory basis for giving any legal effect to a "waiver" of disqualification that does not conform to § 455(e) and that follows the judge's failure to disqualify himself in violation of § 455(a).*

In order to illustrate how greatly the majority opinion deviates from applicable authority, it is necessary only to recite what should have happened here and why. Section 455(a) provides that a United States judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." He or she must avoid "even the appearance of partiality." *Liljeberg*, 486 U.S. at 861-62. The responsibility is automatic, mandatory and self-executing, and a judge's first requirement is to disqualify himself or herself *sua sponte*. *Alexander*, 10 F.3d at 162; App. 39a. "[I]f there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify

himself and let another judge preside over the case." H.R. Rep. No. 1453, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6355 ("House Report"). Here, the trial judge was in plain violation of the statute as of the time that he entered into a disqualifying relationship with the Petruccelli firm, *Liljeberg*, 486 U.S. at 861 -- even if, as the trial judge has asserted, he was not "conscious[ly] aware[]" that the Petruccelli firm was appearing before him while he was considering that firm's submissions on the pending motion to dismiss. (App. 75a.) Concededly, he was aware of the conflict for some time before he disclosed it to petitioner. (*Id.*)

Section 455 was enacted in 1974 to conform to revised Canon 3, adopted in 1973. Its purposes were to codify the Code's requirements, to establish the "appearance of justice standard," and to overrule the "duty to sit." It was viewed as "virtually identical" to Canon 3(D). House Report, 1974 U.S.C.C.A.N. at 6355; *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1112 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). A central problem, addressed in the congressional testimony of former Chief Justice Roger Traynor of the California Superior Court, was that the risks perceived by counsel in confronting a judge on a matter of his or her impartiality had resulted in recurring, timorous conduct -- *i.e.*, lawyers were routinely giving "waivers."[7/]

7/ "Our principal problem was to minimize the chance that a party or counsel would feel under pressure to waive disqualification and to devise a procedure to that end . . . ." Judicial Disqualification: Hearing on S. 1064 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House of Representatives Comm. on the Judiciary, 93d Cong., 2d Sess. 8 (1994) (hereinafter

(continued...)

Congress was made aware that new Canon 3(D) required that any consideration of any waiver be "outside the presence of the judge"; that the party, not just its counsel, must provide any waiver; and that there must be full prior disclosure on the record. Accordingly, section 455(e) itself contemplates waiver only from "parties" after "full disclosure on the record." The issue has remained a concern, and subsequently the Judicial Conference adopted a procedure for parties to respond, anonymously, through the clerk of the court with regard to waiver. (App. 10a-11a.)

Here, in contrast, the district judge, as Judge Campbell's dissent correctly notes, did "exactly" what the statute and Canon 3 proscribed. (App. 40a-43a, 51a-52a.) To summarize: (1) The judge did not provide disclosure "at the earliest practicable time," *Hall*, 695 F.2d at 180 n.3, but waited until the Petruccelli firm had achieved a satisfactory result and he had paid his bill. (2) He did not disqualify himself, 28 U.S.C. § 455(a), and state that he would proceed no further in the absence of unanimous waivers; he noted only that it was "arguably" proper that he "disclose" the matter to "see if anyone ha[d] any objection," while expressing "moral[] certain[ty]" that he could continue (App. 35a.) -- a scenario explicitly discredited by the

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7/(...continued)
"Hearings") (statement of Hon. Roger J. Traynor). "[T]he lawyer who is going to appear before the same judge at another time in another case really has very little choice." Hearings at 13 (statement of John P. Frank). "Judge Biggs said . . . that in his circuit, they all were waiving . . . that is exactly . . . the trouble." Hearings at 20 (statement of Frank).

Judicial Conference.[8/] (3) The judge knew that petitioner's counsel could not possibly have consulted his client to obtain consent. (App. 40a.) (4) The "no objection" response was led by plaintiffs' counsel, who was ethically compromised by his own continuing non-disclosure of the relationship; and the district judge must have known that too. (5) Contrary to the requirements of Canon 3(D), nothing was done outside the presence of the judge. (6) Contrary to the requirements of § 455(e) and the Canon, the alleged waiver had not involved a "party." (7) Contrary to § 455(e), there was no "full disclosure . . . on the record," a requirement strictly construed. *See* 7 James W. Moore, Moore's Federal Practice ¶ 63.07 [2.-3] at 63-28 (2d ed. 1995).[9/] Little else is needed to imagine the pressure placed on counsel to "go along" and to endorse a judge's own declaration of certainty regarding

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8/ "The practice of advising counsel of a possible conflict, and asking counsel to indicate approval of the judge remaining in a particular case, is fraught with potential coercive elements which makes this practice undesirable." *Guide to Judiciary Policies and Procedures*, at I-21, ¶ 11.

9/ The district judge here made a conclusory disclosure, sufficient, perhaps, to explain why he should step down; but clearly insufficient to solicit a party's waiver. Even with two subsequent explanations (App. 56a-58a, 74a-76a.), the district judge never revealed the substance or dimension of his personal dispute; the identity of the other party; the nature of the result achieved by Mr. Petruccelli; or anything else that would allow a party, asked to consider waiver, to take measure of the judge's problem and thus the depth of his potential gratitude. Nevertheless, the majority opinion states that the judge disclosed "book and verse." (App. 24a.) Further, before obtaining the "waiver," the judge did not disclose either that he had actively worked on the pending motion to dismiss after he had retained Mr. Petruccelli or that he intended to issue his decision shortly.

his impartiality.

It bears emphasis that section 455(e), like the Canon on which it was based, does not contemplate a "waiver" from lawyers, but only from "parties." The terms "lawyer" and "party" are differentiated throughout § 455, reflecting the legislative history. The principal expert called by the House Judiciary Committee testified that the requirement that the party sign any waiver was imposed to give "maximum protection to the lawyer," because "it will never be known whether it was the lawyer or the party who drew the line," and that § 455 was designed to be "stricter" than the Canons with respect to waiver.[10/] Chief Justice Traynor's testimony before Congress made clear that Canon 3(D)'s requirement "that the parties . . . agree" was imposed specifically to provide lawyers "an avenue of escape," in order to blunt the "velvet blackjack" of "judicial pressure."[11/]

The position adopted below -- that an invalid waiver might instead blunt petitioner's right to relief -- is manifestly inconsistent with the statute. The opinion below conspicuously downplays the trial judge's disregard of the statute and repeatedly cites the "waiver" and the petitioner's supposed responsibility to act with immediacy as "tip[ping] the equitable balance" against mandamus. (App. 22a.) Reliance upon the invalid waiver pervades the opinion, *e.g.*: "[W]e think that local counsel's unqualified assent, combined with Cargill's

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10/ Hearings at 13 (statement of Frank).

11/ Hearings at 8 (statement of Traynor), and 30 (testimony of Traynor).

subsequent silence for a substantial period of time . . ." (App. 24a.); "While the record does not compel a finding that petitioner and its lead attorneys delayed any attempt to retract Maine counsel's waiver as part of a plot to await the results of the judge's impending decision, the chronology is suggestive" (App. 29a.); "[P]etitioner's course of conduct -- whether conniving or merely slipshod -- influences our assessment of the equities." (App. 31a.)

This approach cannot be squared with the statute or, for that matter, with the factual record. The statute and Canon 3 place responsibility squarely upon the judge. Congress anticipated that the very problems involved in this case could be avoided by the simple expedient of assignment to another judge. House Report, 1974 U.S.C.C.A.N. at 6357. If there is some special need for a particular judge to remain on the case, a need not evident here, the procedures for securing waiver are both clearly stated and easily satisfied; and there is not the slightest suggestion that they could not have been satisfied here. The Judicial Conference informed Congress that the waiver provisions were exclusive and rigorous. "[W]aiver (or remittal) should be permitted only in *specifically defined circumstances and under specified controls*." House Report, 1974 U.S.C.C.A.N. at 6361 (emphasis added).

Further, Congress underscored its intention that the focus remain on judicial compliance by ignoring the recommendation of the Department of Justice that the statute require that "applications for disqualification shall be timely made." House Report, 1974 U.S.C.C.A.N. at 6358. Indeed, Congress specifically addressed the question of possible improper motive by

counsel and stated that the issue had been addressed by requiring that the ground for disqualification "must have a *reasonable* basis." House Report, 1974 U.S.C.C.A.N. at 6355 (emphasis in original).

Against this background, it is clear that the majority's accusatory approach -- as contrasted with Judge Campbell's appraisal of the difficulties facing a litigant (App. 41a, 44a-45a.) -- does not provide the proper rule of decision in a case of this nature. The legislative history provides no basis for the majority opinion's shifting of responsibility (see App. 44a.), much less for it to deny relief on the basis of speculations regarding a party's not taking precipitate action.

Even assuming *arguendo* that it is appropriate to shift inquiry to the conduct of the prejudiced party -- an inquiry barred by the Third Circuit and apparently by the legislative history -- that course should be strictly limited to a situation where others were actually prejudiced, *cf. Liljeberg*, 486 U.S. at 868-69. That was certainly not the case here. The district judge, who was principally responsible for setting the course of events, was not drawn into wasted effort; his lengthy opinion on the motion to dismiss had been composed before disclosure of the Petruccelli relationship. Moreover, both the district judge and plaintiffs' law firm could have avoided the scenario resulting here simply by disclosing their relationship in mid-December. There is no warrant in either the statutory scheme, or in the instant facts, for the complete reversal of statutory responsibilities adopted in the majority's opinion.

3. *The court of appeals, by abdicating its mandamus powers, undermined the Court's objective that judicial disqualification issues must be resolved promptly.*

The court of appeals conceded that an issue of judicial disqualification presents a "sufficiently extraordinary situation" to justify use of its mandamus authority (App. 21a.), but found that there were two requirements -- a "clear entitlement to the requested relief and irreparable harm without it" and a "favorable balance of the equities" -- that precluded (App. 22a.) relief here. It held that the "clear entitlement" criterion was not met because of local counsel's "unequivocal waiver unprompted by the court"[12/] -- thus giving credit to the invalid "waiver" -- and petitioner's waiting until before the scheduled conference ("nearly a month") to set forth its objections. It declared that interval "suggestive" of improper motive. (App. 29a-30a.) On this basis, it declared that it "need go no further" (App. 32a.) -- remitting petitioner to "raise its claim of error, if it so chooses, in an end-of-case appeal." (App. 33a.)

This approach does not fairly take account of the factors bearing on whether to grant the writ; nor does it apply the stated factors correctly. The traditional purpose of the writ is precisely to "confine an inferior

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12/ The court of appeals' palliative statement that local counsel's waiver was "unprompted" is bewildering. The transcript is clear that the trial judge stated that it was "arguably" proper that he disclose the matter to "see if anyone has an objection." It was to this prompting that plaintiffs' counsel then responded, and -- with an additional mitigating interjection by the judge -- that petitioner's counsel responded. (App. 35a.)

court to a lawful exercise of its prescribed jurisdiction," *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978); *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 402 (1976), with the important qualification that the Court has not used a "narrow and technical understanding of what constitutes a matter of 'jurisdiction'," *id.* (citation omitted). Here, section 455(a) explicitly limits the authority of a judge to preside, and a district judge improperly continuing to sit does so beyond his "jurisdiction." *See Mallard v. United States Dist. Court for S. Dist. of Iowa*, 490 U.S. 296, 309 (1989).

It is important that petitioner here had "no alternative remedy available," *see Mallard*, 490 U.S. at 309 -- that is, no current avenue of relief to pursue. *See Heckler v. Ringer*, 466 U.S. 602, 616 (1984); *Kerr*, 426 U.S. at 396. The Court has long held that where judicial impartiality is at issue, "The remedy by appeal is inadequate. It comes after the trial and if prejudice exist it has worked its evil and a judgment of it in a reviewing tribunal is precarious. . . . [N]othing can be more elusive . . . than a disposition of a mind in which there is a personal ingredient." *Berger v. United States*, 255 U.S. 22, 36 (1921).

It is immaterial whether the claim is one of actual bias or one based on objective appearances. Contrary to what the court of appeals apparently believed (App. 31a.), the concern over the existence of facts that would lead a reasonable person to question a judge's impartiality is not an abstraction, but rather gives effect to widespread beliefs about human nature. The official reporter for the Code cited Justice Frankfurter on the point that, "reason cannot control

the subconscious influence of feelings of which it is unaware. When there is ground for believing that such unconscious feelings may operate . . . or . . . lead others to believe they are operating, judges recuse themselves. . . . [T]he administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n of D.C. v. Pollak*, 343 U.S. 451, 466-67 (1952), quoted in E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* at 62 (1973).

Moreover, an end-of-case appeal provides a completely inadequate remedy for the interim harm that would be caused by public perception of a court's entrenching, for the duration of the case, a judge that clearly should not sit. It is this very concern for "our institutional credibility" (App. 42a.) that was the reason for the statute's adoption of the "appearance of injustice" standard and the removal of the "duty to sit." House Report, 1974 U.S.C.C.A.N. at 6355.

Further, the point is made in Judge Campbell's dissent that the majority's "suggestion that this issue may be revisited several years down the road on direct appeal" cannot be taken "seriously" (App. 47a.), particularly given the rules for relief set out in *Liljeberg*, 486 U.S. at 864. "By then there would be overwhelming equities in plaintiffs' favor *not* to require them to undergo the expense and burden of retrying the case . . . ." (App. 47a.) Here, petitioner sought relief at a preliminary stage of the case when, as the Court said in *Berger*, 255 U.S. at 35, "there is no serious detriment to the administration of justice nor inconvenience worth of mention, for of what concern is it to a judge to preside in a particular case [or] . . . to other parties to have him so preside, and any serious delay of trial is avoided. . . ."

On the other hand, the concerns articulated by the court of appeals are misconceived. The requirement that a mandamus petitioner show that its right is "clear and indisputable" does not mean that the matter must be devoid of any possibility of debate, or that the court of appeals can avoid its responsibility to address matters ripe for decision. Rather, the "clear and indisputable" requirement has been used to characterize far different situations -- such as where injuries claimed were themselves "hypothetical," and the case additionally required consideration of a series of complicated legal questions, *Whitehouse v. Illinois Cent. R.R. Co.*, 349 U.S. 366, 372-73 (1955); where the very relief sought was inequitable and would have required the resolution of several "doubtful" questions in petitioner's favor, *United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 357, 360 (1933); where there was "no clear duty" for the respondent to act; or where the resolution of the matter required resort to other, independent proceedings. *See United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 542-43 (1937); *see also Pittston Coal Group v. Sebben*, 488 U.S. 105, 121-22 (1988); *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam).

Here, in contrast, there is a clear duty of the district judge not to sit once § 455(a) is implicated. *Liljeberg*, 486 U.S. at 860-61. The court of appeals did not assert that there were complicated questions here that needed to be developed in other proceedings or that would be more clearly resolvable on direct appeal. Nor is there any threat of piecemeal litigation of issues that are actually part of the merits of the case. There is simply no benefit in deferring the matter for rebriefing and reargument on appeal, but only duplication, waste

and certain injury to the public's perception of judicial integrity.

Equally misplaced is the majority's reliance on "principles of equity" which would deny a writ of mandamus to a party that does not come into court with "clean hands." The majority opinion relied upon *United States ex rel. Turner v. Fisher*, 222 U.S. 204, 209 (1911) (App. 28a.), and cited again the alleged "waiver" and petitioner's alleged inaction. (App. 30a-31a.) However, the reasons which would weigh against a grant of the writ because of "unclean hands" have a gravity that bears no relation to the instant facts. For example, *Fisher* involved perjury -- "fraud, thus admitted." 222 U.S. at 209. Similarly, *Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 815-19 (1945), involved petitioner's perjury. In fact, it is doubtful that *any* weight may be afforded to the factors on which the majority relied, inasmuch as the "waiver" clearly violated the statute, and Congress declined to incorporate a timeliness requirement in § 455. House Report, 1974 U.S.C.C.A.N. at 6358. Indeed, if any "delay" had consequence here, in view of the statutory objectives, it was that of the district judge and plaintiffs in failing to disclose their relationship in mid-December, thus creating the very time pressures upon which the majority opinion relies.

Similarly, lower court cases cited in the majority opinion -- where events intervening between the disqualifying act and a litigant's objection were given consideration -- have no imaginable semblance to the instant facts. *See, e.g., In re Allied-Signal, Inc.*, 891 F.2d 967, 971-72 (1st Cir. 1989) (Breyer, J.) (objections came 2 years after facts became known in a highly developed

and complex case, and the alleged conflict was "weak and remote"); *In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312-16 (2d Cir. 1988) (no substantive basis for disqualification; over a year of pretrial proceedings had already resulted in 3 judicial opinions and 36 orders), *cert. denied*, 490 U.S. 1102 (1989); *In re United Shoe Mach. Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) (petitioner "knew of [disqualifying] circumstances for two and a half years and said nothing"); *Reilly v. United States*, 863 F.2d 149, 160 (1st Cir. 1988) (first objection made 7 months after the event and after trial on the merits had occurred). The Petition for Writ of Mandamus cited 10 cases on this point, Petition for Writ of Mandamus at 31 n.19, *In re Cargill, Inc.*, Docket No. 94-8042 (1st Cir. filed July 5, 1994); all demonstrate that lower court cases concerned with a party's alleged "lying in wait" before raising an objection, involved delays of many months or years, or until final judgment had been rendered following trial, or both.

4. *Issues of the timing of an objection may affect the nature of relief, but do not permit the perpetuation of a violation of § 455 or damage to the administration of justice.*

The majority's espousal of a rule of adjudication that postpones substantive consideration to the end of the case also confuses two different matters, *viz:* (1) the importance of exercising mandamus jurisdiction so as promptly to resolve disqualification issues, and (2) the framing of appropriate relief. Even assuming *arguendo* that the court of appeals could give affirmative weight to factors that are in conflict with the statute, it erred in failing to recognize that factors involving the timing of disclosures by the district judge, or of objections by the

parties, would go only to the manner of framing appropriate, prompt relief. *Liljeberg*, 486 U.S. at 864, 867-69; *In re School Asbestos Litig.*, 977 F.2d 764, 785-87 (3d Cir. 1992); *In re Allied-Signal*, 891 F.2d 974, 975-76 (1st Cir. 1989) (Breyer, J.).

The *Liljeberg* decision requires that a court consider such matters in assessing the relative justice of possible remedies and the "risk of undermining the public's confidence in the judicial process." 486 U.S. at 864. Applying the principles of *Liljeberg* here, the district judge's apparent failure to deal properly with his ethical responsibilities set the very framework for subsequent events; these actions can hardly generate favorable equities. Much the same can be said of plaintiffs' counsel's withholding disclosure of the relationship for weeks, and then leading the process of the so-called "waiver." Petitioner was, in contrast, unprepared for the January 12 conference and yet was called upon by the majority opinion to act with uncommon speed and to put itself at risk while ill-informed as to its legal rights. Once informed, petitioner acted responsibly. The fact that the district judge had decided the motion to dismiss carries little weight here; both jury and non-jury verdicts have been upset in order to vindicate § 455(a). Little had occurred in this case. Yet, to allow the judge to preside throughout the trial while apparently partial to one side -- and after violating applicable procedures -- is obviously wasteful and damaging to public perception of the integrity of the judicial system. *See United States v. Murphy*, 768 F.2d 1518, 1539 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986).

The course set by the opinion below could hardly be more awkward. Further proceedings in this case can proceed only with the threat of a disqualification "time bomb" that may upset any judgment. The judge will expend his own time in this uncertain endeavor while remaining under a cloud. Petitioner will be forced to try a significant case under a substantive ruling that is manifestly erroneous and has an apparently improper origin, only to reargue the disqualification matter on appeal, with delay and duplication. On the other hand, Judge Campbell's observation that there is no realistic prospect of the matter being considered on end-of-case appeal suggests that the denial of mandamus here comprises an effective denial of due process.

Further, the implicit message and tone of the majority's opinion are inappropriate. This case involved solely an application to decide an important issue of judicial disqualification at an early stage. The writ will not serve as a "weapon" (App. 28a.), and can hardly serve in a plausible story-line of a "plot," (App. 29a.) -- particularly since the key operative circumstances were generated by the district judge himself. There is a gross anomaly in urging that a litigant state its grievance for disqualification promptly and in stressing the societal imperative of an impartial judiciary, on one hand; and then, out of alleged concern that litigants may use such petitions for "strategic value" -- a concern that is refuted by available statistics -- in condoning and perpetuating an ostensible appearance of impropriety, on the other hand, all on the strength of a mere "suggestion" of "gamesmanship." (App. 32a.)

Ultimately, the majority opinion concedes that it would require that petitioner communicate its

misgivings and "run the risk" of offending the judge (App. 31a n.9.), *not* in seeking recusal, but *in advance* of it. Consequently, even if petitioner were later to determine that a request for recusal was not well grounded, petitioner would already have revealed itself as uncomfortable with the judge's integrity. The majority thus forces a litigant to borrow the very trouble sought to be avoided by § 455(e), before making any recusal request. Even if the request were not later made, the damage would already have been done.

The systemic implications are equally harmful. The majority holds that an appellate court should refuse to decide substantive issues under § 455 at an early stage of the case if the matter is, in any material respect, less than "clear cut." To this end, "suggestive" speculations on the party's motivations are sufficient to deny relief. Yet a litigant that has a legitimate, but in some respect uncertain, claim for disqualification *must* raise it with the district court judge promptly or risk "waiving" it. The district court judge, however, would understand that any doubt in the claim will insulate from immediate appellate review his or her refusal to recuse. Particularly in the overwhelming majority of federal court cases that do *not* go to trial -- about 93% -- the practical result is not only to defeat that claim but also to place the complainant in a damaged position for the duration of the case. Such a litigant risks retribution; and its fear that the judge may be partial will undoubtedly affect its own assessment of the case, including its settlement value. The ultimate consequence is that litigants will apprehend that they should not raise disqualification matters at all, unless they are devoid of doubt.

5. *The opinion conflicts with the holding in Liljeberg on matters of remedy.*

Even assuming *arguendo* that the petitioner was "untimely" in relation to the district judge's decision on the motion to dismiss, it was certainly timely, under any articulated standard, in relation to the judge's sitting for the remainder of a case that had only just begun. Thus, the district judge should have recused himself from further proceedings.

Turning to the impact of the Petruccelli relationship on the judge's decision on the motion to dismiss, that matter should have been governed by the factors outlined in *Liljeberg*, 486 U.S. at 867-69, which involve comparing the equities and injustices of various courses of action. Here, no party will be injured by review by an unquestionably impartial judge. The cost -- review of a question of law on a motion to dismiss -- is insubstantial. Further, the Court in *Liljeberg* gave regard to the apparent merit of the substantive decision rendered. *Id.* at 868-69. Here, such a review suggests that the decision granting antitrust standing was plainly in error. The ultimate question is therefore whether a new judge should be required to adopt an opinion that appears both erroneous and possibly tainted. Such a result is not appropriate.

6. *The issues presented are of great importance to the administration of justice and present a special need for uniformity of treatment.*

The Court's concern for the appearance of, and not just the actuality of, judicial integrity is of the highest level of importance and "has constitutional

dimensions." *Liljeberg*, 486 U.S. at 864 n.12. Due process requires that the judge be beyond any reasonable question, based on objective appearances, that he or she cannot "hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. at 825.[13/] Further, there is an obvious need for uniformity in both ethical standards and the procedures designed to implement those standards.

The issues presented by the instant petition -- the responsibility of a judge to recognize a conflict and to deal with it promptly; the requirement to follow conscientiously the requirements as to waiver; and the proper manner of appellate resolution of substantial issues of judicial disqualification that cloud the conduct of a case -- are fundamental and of essential concern. There is little authoritative guidance available and a lack of uniformity.

The issues themselves gain special importance by reason of the overarching concern that the public perceive the judicial system as maintaining the highest standards of fairness and integrity. *See Murphy*, 768 F.2d at 1539. Because the opinion below sets a decidedly wrong, and potentially influential, course in this very important area, the Court should grant a writ of certiorari to review it.

13/ The real, and reasonable, concern of petitioner was and remains that a large corporation, facing a jury trial in a community where it has few roots, involving the sensitive issue of employee firing, had particular need of a forum that would hold the balance "nice, clear and true." *Id.*

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Bernhardt K. Wruble*
William R. Sherman
Verner, Liipfert, Bernhard,
McPherson and Hand, Chartered
901 - 15th Street, N.W.
Washington, D.C. 20005-2301
(202) 371-6097

Peter J. DeTroy
Norman, Hanson & DeTroy
415 Congress Street
Portland, Maine 04112
(207) 774-7000

Counsel for Petitioner
* *Counsel of Record*

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